NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JOSE DE JESUS SANDOVAL-GONZALEZ, Defendant - Appellant.	No. 02-50501 D.C. No. CR-02-00718-NAJ MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Napoleon A. Jones, District Judge, Presiding

Argued and Submitted August 7, 2003
Pasadena, California

Before: ALDISERT**, TALLMAN, and RAWLINSON, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

1. There was no *Terry* stop when the investigating officer initially approached Sandoval-Gonzalez. Sandoval-Gonzalez's car was broken down in a public place, and the officer stopped to provide assistance. *See Florida v. Bostick*, 501 U.S. 429, 434 (1998) (noting that "a seizure does not occur simply because a police officer approaches an individual and asks a few questions"). By the time Sandoval-Gonzalez was detained and frisked, the officers had "a particularized and objective basis for suspecting criminal activity." *See United States v. Colin*, 314 F.3d 439, 442 (9th Cir. 2002) (citations and internal quotation marks omitted). Specifically, Sandoval-Gonzalez could not produce any identification when asked to do so by the police; he identified himself to the police using different names; he informed the police that he was subject to probation or parole conditions; and he was discovered in a high crime area at three o'clock in the morning.

2. On appeal, Sandoval-Gonzalez asserts that the police officers exceeded the scope of the *Terry* stop when they forced him to remove his clothing so that they could examine his tattoos. Sandoval-Gonzalez waived this argument by failing to present it to the district court. *See United States v. Hawkins*, 249 F.3d 867, 872 (9th Cir. 2001).

3. The district court did not err in denying Sandoval-Gonzalez's motion to suppress based on an impermissible frisk. The police officer frisked Sandoval-Gonzalez so as to take "such steps . . . reasonably necessary to protect . . . personal safety and to maintain the status quo during the course of the stop." *See United States v. $109,179 in United States Currency*, 228 F.3d 1080, 1084 (9th Cir. 2000) (citation omitted).

4. Sandoval-Gonzalez voluntarily requested that he be allowed to sit in the police car; he was not handcuffed; and he volunteered that he was an illegal alien. Under the totality of circumstances, Sandoval-Gonzalez was not in custody for *Miranda* purposes. *See Alvarado v. Hickman*, 316 F.3d 841, 846 (9th Cir. 2002).

5. The district court did not err in providing a derivative citizenship instruction after the jury retired. "[A] defendant is not entitled to any particular form of an instruction, so long as the instructions given fairly and adequately cover his theories of defense." *United States v. Dixon*, 201 F.3d 1223, 1231 (9th Cir. 2000) (citation omitted). The district court did not abuse its discretion in denying Sandoval-Gonzalez's request to reopen closing argument because Sandoval-Gonzalez's theory of defense was adequately covered in defense counsel's closing

argument given before the jury retired. *See United States v. Spillone*, 879 F.2d 514, 518 (9th Cir. 1989).

6. Sandoval-Gonzalez's argument that the indictment was insufficient since it failed to allege a voluntary entry as an element of the "found in" offense pursuant to 8 U.S.C. § 1326 is foreclosed by our holding in *United States v. Parga-Rosas*, 238 F.3d 1209, 1213 (9th Cir. 2001).

AFFIRMED.